Building Reform from the Bottom Up: Formulating Local Rules for Bankruptcy Court-Annexed Mediation

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I. INTRODUCTION

After years of academic study, pilot projects and judicial debate, alternative dispute resolution (ADR) has come into its own. Individuals, corporations and judges weary of overcrowded courts, lengthy proceedings and soaring legal costs are "fueling what is fast becoming one of the most successful experiments in privatization."[1]

The primary objectives of the Bankruptcy Code[2] are debtor rehabilitation and maximum distribution to creditors.[3] Both objectives are frustrated when bankruptcy proceedings linger unresolved, accumulating costs.[4] As bankruptcy courts seek to improve efficiency without sacrificing

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[1] Eric Schine & Linda Himelstein, *The Explosion in Private Justice,* BUS. WK., June 12, 1995, at 88, 89.

[2] United States Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1330 (1978)), *amended by* The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 (1986), and the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4147 (1994) [hereinafter Bankruptcy Code]. The Bankruptcy Code was enacted in 1978 and became effective in 1979.

[3] *See* Anne M. Burr, *The Unproposed Solution to Chapter 11 Reform: Assessing Management Responsibility for Business Failures,* 25 CAL. W. INT'L L.J. 113, 129 (1994).

[4] *See* Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and*

fairness, they increasingly turn to ADR programs.[5]

Bankruptcy courts hoping to implement ADR programs find scant guidance, however. National guidelines are virtually nonexistent, federal district court rules on ADR fail to address bankruptcy concerns and fledgling bankruptcy court programs operate on an ad hoc basis. Bankruptcy courts must begin from scratch, anticipating difficulties that might arise in a variety of situations that have yet to be tested.[6]

Recently, attempts have been made to draft national rules on bankruptcy court-annexed ADR.[7] However, these rules fail to take into consideration the varying needs of individual judicial districts.[8] As a result, the vast majority of bankruptcy courts have declined to implement ADR programs.

This article proposes guidelines for developing local rules for bankruptcy court-annexed ADR programs, particularly bankruptcy court-annexed mediation. Part II of this article examines ADR as it has evolved in the federal district courts. It reviews legislation encouraging the development of mediation and arbitration—the primary types of ADR—and the problems encountered by the district courts in implementing ADR. Part III of the article examines ADR as applied in the bankruptcy courts. It reviews bankruptcy legislation supporting ADR, mediation and arbitration as they are practiced in bankruptcy court and special problems encountered

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Bankruptcy Mediation Programs, 68 AM. BANKR. L.J. 55, 56 (1994).

[5] *See Alternative Dispute Resolution Subcommittee Update*, AM. BANKR. INST. J., Oct. 1995, at 9.

[6] I became interested in this subject while serving on a subcommittee of the Advisory Committee of the Eastern District of Michigan Bankruptcy Court charged with developing a court-annexed mediation program. Our committee reviewed the district court mediation rule, the state mediation rule and several rules and orders from other bankruptcy districts. Neither the state court nor federal district court rules were appropriate for bankruptcy. Rules and orders from other districts were limited and, with the exception of an order from the Southern District of California, were without commentary as to why certain provisions were adopted over others. *See infra* notes 161-183 and accompanying text.

[7] Recently, both the American Bar Association and the American Bankruptcy Institute have been involved in efforts to promote ADR in the bankruptcy courts. *See Alternative Dispute Resolution Subcommittee Update*, AM. BANKR. INST. J., Oct. 1995, at 9.

[8] Participation in the rulemaking process emphasized for me the importance of choice in formulating an ADR rule. My original intention was to formulate the "perfect" ADR program for bankruptcy courts. However, in drafting our local rule, our committee had to consider many factors, including local politics and economics, that caused us to deviate from "perfect" conditions. Obviously the political, economic and other needs of each district will vary and will change as the programs develop; thus, my emphasis on building individualized rules for each district.

by the use of ADR in bankruptcy. Part IV of the article examines the types of bankruptcy disputes successfully resolved by ADR programs. Part V of the article focuses on bankruptcy court-annexed mediation. It examines the advantages of court-annexed mediation over arbitration and litigation as well as the common characteristics of bankruptcy court-annexed mediation programs. Finally, Part VI of the article proposes guidelines for developing local rules on bankruptcy court-annexed mediation.

II. ADR IN THE FEDERAL DISTRICT COURTS

Any discussion of guidelines for bankruptcy court ADR programs must take into consideration the development of ADR in the federal district courts. Recent legislation encouraging ADR is directed by Congress to the district courts.[9] Bankruptcy courts are considered a division of the district courts;[10] hence, the legislation which encourages and authorizes district court ADR programs also encourages and authorizes bankruptcy court programs.

A. *Legislation*

Congress enacted the Judicial Improvements Act of 1990 on October 26, 1990 (Judicial Improvements Act).[11] It became effective on December 1, 1990 and requires each federal district court to develop a civil justice expense and delay plan.[12]

Title I of the Judicial Improvements Act is known as the Civil Justice Reform Act of 1990 (CJRA).[13] A primary purpose of the CJRA is to reduce delays associated with the civil litigation process. Section 102 of the CJRA provides that "an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including . . . utilization of alternative dispute resolution programs in appropriate cases."[14] Section 103 of the CJRA requires the district courts to formulate plans which "may include . . . authorization to refer appropriate

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[9] *See infra* notes 11-17 and accompanying text.

[10] *See infra* notes 80-89 and accompanying text.

[11] Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified at 28 U.S.C. §§ 471–482 (1994)) [hereinafter Judicial Improvements Act].

[12] *See id.* § 471.

[13] Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified at 28 U.S.C. § 473 (1994)) [hereinafter CJRA]. For a discussion of the CJRA, see Joseph R. Biden, Jr., *Equal Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 5-8 (1992).

[14] 28 U.S.C. § 473 (1994).

cases to alternative dispute resolution programs . . . including mediation, minitrial, and summary jury trial."[15]

The Judicial Improvements Act is notable for its adoption of efficiency goals and purposes.[16] The CJRA is notable for its Congressional endorsement of alternative dispute resolution as a case management device.[17]

B. *ADR in Practice in the Federal District Courts*

Before discussing ADR in the bankruptcy courts, this Article will discuss some of the criticisms of ADR in general, after a brief introduction to arbitration and mediation. Congressional endorsement of ADR has resulted in its increased use by courts and private institutions.[18] ADR has been institutionalized in professional associations[19] and has spawned its own publications,[20] law reviews[21] and course offerings.[22] The term ADR has many connotations. It may describe any extra-judicial procedure through which private parties agree to resolve civil legal disputes[23] including

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[15] 28 U.S.C. §§ 473(b)(4), 473(a)(6)(B) (1994).

[16] *See* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 16 (1991).

[17] *See id.* at 15; Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 947-948 (1991).

[18] *See* Menkel-Meadow, *supra* note 16, at 16-17 (discussing the growth and institutionalization of ADR).

[19] Professional associations include the Society of Professionals in Dispute Resolution (SPIDR), The National Institute of Dispute Resolution (NIDR), the ADR Section of the American Association of Law Schools (AALS) and the American Bar Association (ABA) Special Committee on Dispute Resolution.

[20] Publications include the BNA Reporter, *Alternative Dispute Resolution Report*; a CPR newsletter, *Alternatives to the High Cost of Litigation* and a NIDR newsletter, *Dispute Resolution Forum.*

[21] Law reviews include the *Ohio State Journal on Dispute Resolution* and the *Missouri Journal of Dispute Resolution.*

[22] At least 164 law schools now offer courses in ADR with 574 professors teaching the subject. Menkel-Meadow, *supra* note 16, at 16 (citing West Publishing, 42 LAW SCH. NEWS 2 (Feb. 1990)).

[23] *See* Dayton, *supra* note 17, at 897. Alternative dispute resolution has been defined as:

> a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts.

minitrials,[24] summary jury trials,[25] early neutral evaluation,[26] arbitration

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James F. Henry & Jethro K. Lieberman, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425-426 (1986). *See* Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985) (discussing extra-judicial ADR).

[24] The first use of the minitrial was a patent infringement action brought by Telecredit against TRW. After lengthy litigation, the parties employed nonbinding arbitration involving executives of both corporations and retired Judge James Davis of the Court of Claims. Thirty minutes after the hearing, the parties settled. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 673 n.16 (1986) (citing Eric D. Green, *Recent Developments in Alternative Forms of Dispute Resolutions (ADR)*, 100 F.R.D. 512, 514–516 (1983)). The minitrial has been successful in settling disputes of several major corporations including Control Data Corp., Burroughs Corp., Gillette Corp. and Texaco. *See id.* at 673 n.17.

Also related to minitrials are jury determined settlements. This process was originally developed for medical malpractice cases through Duke Law School's Medical Malpractice Research Project but is also being used in other types of personal injury suits. It is a voluntary, abbreviated procedure and uses a jury to decide the outcome. Parties retain almost total control of the process, and the jury verdict is binding. *See* Neil Vidmar & Jeffrey Rice, *Jury Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89, 98-99 (1991).

[25] The summary jury trial, modeled after the minitrial, was originated by Judge Thomas D. Lambros of the Northern District of Ohio. *See* Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 805-806 (1989) (discussing "simplified pretrial informational transactions" or "SPRINT"); Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984). The summary jury trial involves an abbreviated presentation of a case to a six-member jury selected from the jury pool. Each side gives a summary version of the material they would present at trial. Witnesses may be allowed to testify in person or by affidavit. The judge then instructs the jury, which deliberates and renders a verdict. The verdict is nonbinding and does not preclude a subsequent trial *de novo*. The entire process generally takes less than two days, and attorneys and clients are encouraged to discuss the case with the jurors. Procedures for summary jury trials are described in Dayton, *supra* note 17, at 905–908; Vidmar & Rice, *supra* note 24, at 95; A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 13–17 (1990).

The theory of the summary jury trial is that, by presenting their positions concisely and efficiently in an abbreviated hearing, the parties can predict the outcome of a full trial and negotiate a settlement. *See* Dayton, *supra* note 17, at 907; Vidmar & Rice, *supra* note 24, at 96. The summary jury trial is most often utilized when the sides have reached an impasse in

and mediation.[27] The most popular of these are arbitration and mediation.

1. *Arbitration*

Contractual arbitration involves the submission of a dispute to a neutral third party in a private, informal and expeditious proceeding. Following presentation of the evidence, the neutral party renders a decision that is binding upon the parties.[28] The scope of appellate review of an arbitration award is generally determined by the contract. Under common law, the review of an arbitrator's decision is very limited.[29]

The United States Arbitration Act of 1947 (Arbitration Act)[30] grants contractual arbitration clauses status as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

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the settlement negotiations and the case is ready for trial. *See* Dayton, *supra* note 17, at 907.

[26] Early neutral evaluation has been adopted by the Northern District of California. *See* Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 279-281 (1986). The Superior Court of the District of Columbia has also been experimenting with early neutral dispute resolution. *See* Hon. Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 590 (1988).

Early neutral evaluation involves an evaluation of the case by a neutral attorney prior to major discovery. The evaluator receives a ten page statement from each party and presides over oral argument. Following oral argument, the evaluator assesses the strengths and weaknesses of the parties' legal positions and evidence and offers a nonbinding evaluation of the case. *See* Brazil et al., *supra*, at 280.

The purpose of early neutral evaluation is to force the parties to prepare an early, realistic assessment of a case's merits and to obtain the evaluation of a neutral party, thereby encouraging settlement. *See id.*; Kaufman, *supra* note 25, at 12-13. If the evaluator finds the parties willing to explore settlement following the evaluation, he or she may facilitate negotiations by mediating the dispute. *See* Kaufman, *supra* note 25, at 13.

[27] *See* Dayton, *supra* note 17, at 898. This article does not discuss managerial judging or procedures explicitly authorized by the Federal Rules of Civil Procedure such as settlement conferences. For a discussion of these procedures, see Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982).

[28] *See* Robert A. Izard, Jr. et al., *Alternative Dispute Resolution in Bankruptcy*, 3 J. BANKR. L. PRAC. 291, 291 (1991).

[29] *See id.* at 295. *See, e.g.*, 9 U.S.C. § 10 (1970) (providing that an award may be vacated only when it is procured by corruption, fraud or undue means, or when there is arbitrator misconduct, or when the arbitrator has so exceeded his other powers, or imperfectly executed them, that a mutual, final and definite award has not been made).

[30] 9 U.S.C. §§ 1-208 (1970).

contract."[31] The United States Supreme Court has held that the Arbitration Act establishes a strong federal policy favoring arbitration.[32]

Court-annexed arbitration differs from contractual arbitration in that participation in the proceedings is mandated by the judge and the results are nonbinding; the participants may demand a trial de novo if they are not satisfied with the results.[33] At least ten federal district courts now employ some form of mandatory court-annexed arbitration on a consistent basis.[34]

The goals of court-annexed arbitration are to reduce the costs of litigation, to facilitate timely disposition of claims and to reduce the number of cases going to trial.[35] These goals apply to contractual arbitration as well, although contractual arbitration often has the additional goals of assuring the privacy of a non-public proceeding and incorporating the use of expert decisionmakers.[36]

2. *Mediation*

Mediation is the conciliation of a dispute through the non-coercive intervention of a third party. It is the oldest and most familiar form of ADR.[37] The most recent interest in mediation programs has been in court-

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[31] Lomax, *supra* note 4, at 63 n.45 (citing 9 U.S.C. § 2 (1970)).

[32] *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987). The Court required the party opposing arbitration to show that Congress intended to limit the Arbitration Act's application. A party may meet this burden by relying on the text or legislative history of the statute or by showing an inherent conflict between the statute's purpose and arbitration. *See id.* at 226-227.

[33] *See* Kaufman, *supra* note 25, at 17-18; Dayton, *supra* note 17, at 898-905; Edwards, *supra* note 24, at 674; Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 218 (1989) (discussing federal court-annexed arbitration).

[34] *See* Dayton, *supra* note 17, at 898 n.45. These ten federal districts are: (1) the Eastern District of Pennsylvania, (2) the Northern District of California, (3) the Middle District of Florida, (4) the Middle District of North Carolina, (5) the District of New Jersey, (6) the Western District of Oklahoma, (7) the Western District of Texas, (8) the Western District of Michigan, (9) the Western District of Missouri and (10) the Eastern District of New York.

[35] *See* Levin & Golash, *supra* note 25, at 33 (citing E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 1, 5 (rev. ed. 1983)).

[36] *See* Lomax, *supra* note 4, at 63; D. James Mackall, *Balancing Section 3 of the United States Arbitration Act and Section 1471 of the Bankruptcy Reform Act of 1978: A Bankruptcy Judge's Exercise of "Sound Discretion,"* 53 U. CIN. L. REV. 231, 233 (1984).

[37] *See* Dayton, *supra* note 17, at 909; Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971); Izard et al., *supra* note 28, at 295; Levin &

annexed mediation, where courts refer cases to agencies or individual mediators and approve the ultimate disposition of the matter.[38] Court-annexed mediation has been employed in several federal district courts.[39]

Mediation typically occurs in a neutral setting. Counsel presents the facts and supporting law. The mediator facilitates settlement negotiations through a combination of joint and separate meetings.[40] If the parties are unable to reach settlement, the session is ended and the case proceeds to trial.[41]

A principal goal of mediation is to promote settlement by accelerating the process of narrowing and evaluating issues. Unlike an arbitrator, a mediator has no power to impose any settlement or decision upon the parties. Hence, for mediation to succeed, the parties must engage in meaningful discussion.[42] However, because the parties to a mediation are active in negotiating the settlement, they are more supportive of its terms.[43]

C. *Criticism of ADR*

Criticism of ADR focuses on several issues: the Seventh Amendment, equal protection and due process, confidentiality, public access and rulemaking authority.[44]

Golash *supra* note 25, at 40; Lomax, *supra* note 4, at 69; Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 977, 983 (1992–1993).

[38] *See* Stulberg, *supra* note 37, at 983.

[39] *See* Dayton, *supra* note 17, at 909. The districts include the Eastern District of Michigan, the Eastern and Western Districts of Washington and the District of Kansas. *See id.*

[40] *See* Izard et al., *supra* note 28, at 295; Lomax, *supra* note 4, at 69.

[41] *See* Lomax, *supra* note 4, at 70.

[42] *See* Izard et al., *supra* note 28, at 295. The role of the mediator is not to act as decisionmaker but rather to facilitate negotiations between the parties. For a discussion of a mediator's role, see CHRISTOPHER W. MOORE, THE MEDIATION PROCESS (1986).

[43] *See* Lomax, *supra* note 4, at 70 (citing NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION, 22–23 (1989)).

[44] *See* Dayton, *supra* note 17; Kaufman, *supra* note 25; Menkel-Meadow, *supra* note 16. This paper assumes, arguendo, that ADR programs work in that they cut costs and reduce congestion. Statistical data suggests they do. *See* Kaufman, *supra* note 25, at 22, nn.143, 144. However, some critics argue that ADR programs lead to unanticipated consequences undermining the contribution they make to speedy resolution. *See, e.g.*, Dayton, *supra* note 17, at 951 (criticizing express congressional finding in CJRA that ADR is a valuable means to reduce delay and costs).

1. *The Seventh Amendment*

If ADR programs were an optional service provided to litigants, they would raise few constitutional issues. However, many programs are mandated by the courts.[45] The primary attack on court-mandated ADR is that it restricts the Seventh Amendment right to jury trial.[46]

The Seventh Amendment preserves the right to jury trial if the issues of fact "cannot be settled by the parties or determined as a matter of law."[47] Nevertheless, Congress has "considerable discretion" to direct litigation to alternate forums prior to trial to "prevent unnecessary delay and unreasonable expense."[48] Accordingly, procedures requiring parties to engage in alternate fact finding prior to trial have been consistently upheld.[49]

Existing federal ADR programs do not deny litigants the opportunity to have their cases heard by a jury nor do they influence jury deliberations.[50] Nevertheless, federal ADR programs do provide for additional pretrial procedures, often at the expense of the litigants, which may delay the opportunity for a jury trial.[51] The issue thus becomes to what degree ADR may burden the right to jury trial and still satisfy the Seventh Amendment.[52] If the delay or financial risk imposed on a litigant who seeks a jury trial de novo is great enough, an ADR program may pose a threat to the Seventh Amendment right to jury trial.[53] To date, however, no federal ADR

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[45] *See* Kaufman, *supra* note 25, at 24–25. Mandatory refers to "court imposed" ADR; it does not mean final and binding ADR.

[46] *See* Kaufman, *supra* note 25, at 26 n.167 (citing REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 84 (1990)); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993).

[47] Woods v. Holy Cross Hosp., 591 F.2d 1164, 1178 (5th Cir. 1979).

[48] Capital Traction Co. v. Hof, 174 U.S. 1, 44 (1899). In *Capital Traction*, the Supreme Court noted that the Seventh Amendment "does not prescribe at what stage of an action a trial by jury must . . . be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it." *Id.* at 23.

[49] *See* Kaufman, *supra* note 25, at 26 (citing *Capital Traction*).

[50] *See* Levin & Golash, *supra* note 25, at 45.

[51] *See* Levin & Golash, *supra* note 25, at 45 n.125. *See, e.g.*, E.D. MICH. R. 32(f) (requiring a $75 fee for mediation).

[52] *See* Levin & Golash, *supra* note 25, at 45–46.

[53] Examples of state courts striking down ADR programs on the basis of the Seventh Amendment include *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980). The Pennsylvania Supreme Court struck down the compulsory arbitration provision of a statute it had previously held facially valid, finding that in practice it imposed intolerable delays on litigants. The court found that "the lengthy delay occasioned by the arbitration system . . . does in fact burden the

program has been found to pose such a threat.[54]

2. *Equal Protection and Due Process*

Equal protection challenges have been made, unsuccessfully, to the classification of cases for ADR treatment.[55] Courts, applying the rational basis test, have found neither suspect classifications nor restrictions of fundamental rights.[56] Rather, the courts have held that the classifications

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right of a jury trial with onerous conditions, restrictions or regulations . . . which make the right practically unavailable." *Id.* at 195. In *Mattos,* almost three-fourths of all claims filed under the arbitration program had not been resolved and some had been pending in arbitration over four years. *See id.* At least two commentators believe that the *Mattos* court's reasoning would apply with equal force to a federal court program which delayed resolution of claims to a like extent. *See* Levin & Golash, *supra* note 25, at 46 n.131.

[54] *See* Kaufman, *supra* note 25, at 27. The tests applied to measure the threat have varied. Some courts have balanced benefits and burdens to determine the reasonableness of required procedures. *See, e.g.*, Kimbrough v. Holiday Inn, 478 F. Supp. 566, 570-571 n.11 (E.D. Pa. 1979). Other courts have indicated that burdens do not violate the right to jury trial unless they effectively preclude trial by jury. *See, e.g., In re* Smith, 112 A.2d 625, 629 (Pa.), *appeal dismissed,* 350 U.S. 858 (1955).

The federal programs in effect can survive either test. *See* Levin & Golash, *supra* note 25, at 46-47. *See, e.g.*, Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268 (6th Cir. 1985) ("Federal courts have repeatedly upheld mandatory arbitration procedures in the face of challenges based on the right to a jury trial."); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1179 (5th Cir. 1979) (medical liability mediation panel did not violate Seventh Amendment); New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 714 (E.D. Pa. 1983) (compulsory arbitration program did not violate Seventh Amendment); *Kimbrough,* 478 F. Supp. at 569 ("[A] procedure for nonjudicial determination prior to a jury trial does not constitute a Seventh Amendment violation.").

[55] *See* Levin & Golash, *supra* note 25, at 47. *See, e.g., Woods,* 591 F.2d at 1172; *Kimbrough,* 478 F. Supp. at 574. Equal protection challenges have also been generally unsuccessful in state courts. *See, e.g.*, Eastin v. Broomfield, 570 P.2d 744 (Ariz. 1977); Prendergast v. Nelson, 256 N.W.2d 657, 668 (Neb. 1977). However, certain state equal protection challenges to medical malpractice ADR statutes have prevailed. *See, e.g.*, Simon v. St. Elizabeth Med. Ctr., 3 Ohio Op.3d 164 (Ohio C.P. 1976); Boucher v. Sayeed, 459 A.2d 87, 91-93 (R.I. 1983).

[56] *See* Levin & Golash, *supra* note 25, at 47-48. *See, e.g., Woods,* 591 F.2d at 1173.

Under strict scrutiny, the presumption of a government program's validity evaporates. The government carries a "heavy burden of justification" to show that the challenged program is narrowly tailored and structured with precision. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972)). When no fundamental right or suspect class is involved, a court need only determine

created by federal court ADR programs are designed to include as many cases as practical and bear a rational relationship to the legitimate objectives of reducing court costs and congestion.[57]

Challenges to ADR on the basis of due process have been equally unsuccessful. Due process challenges are generally based on the delays and additional costs occasioned by the ADR programs.[58] However, civil litigants do not have a constitutional right to speedy adjudication and the delays and costs associated with ADR are minimal.[59]

3. *Confidentiality*

Federal Rule of Evidence 408 provides that evidence of settlement negotiations is not admissible to prove liability.[60] Nevertheless, Rule 408 does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations, nor does it require exclusion of evidence that is admissible for purposes other than proof of liability.[61] Furthermore, Rule 408 only concerns the inadmissibility of evidence; it does not prevent a participant from disclosing information.[62]

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whether the program "rationally furthers some legitimate, articulated state purpose." *Id.* at 17.

[57] *See* Levin & Golash, *supra* note 25, at 48.

[58] *See id. See, e.g.*, American Protection Ins. Co. v. MGM Grand Hotel—Las Vegas, Inc., 748 F.2d 1293, 1297 (9th Cir. 1984).

[59] *See* Levin & Golash, *supra* note 25, at 48.

[60] FED. R. EVID. 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

[61] *See id.* For a discussion of Federal Rule of Evidence 408, see Leslie T. Gladstone, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 PEPP. L. REV. 237 (1989).

[62] FED. R. EVID. 408; *See* Lomax, *supra* note 4, at 76–77; Izard et al., *supra* note 28, at 296–297.

Because matters disclosed during ADR must be deemed privileged communications to ensure confidentiality from discovery, many courts have promulgated local rules creating privileges for documents and statements presented by the participants during ADR.[63] However, it is questionable whether a court can create and enforce a privilege that does not otherwise exist.[64] Federal Rule of Evidence 501 provides that privileges are governed by the principles of common law "unless otherwise required by the Constitution of the United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority."[65] Hence, maintaining the confidentiality of matters disclosed during ADR is problematic.[66]

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[63] *See* Izard et al., *supra* note 28, at 296-297; Lomax, *supra* note 4, at 77. For example, the General Order in the Southern District of California provides:

> All proceedings or writings of the mediation conference, including the case questionaire, mediator's settlement recommendation, plus any statement made by any party, attorney or other participant, shall in all respects be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury or construed for any purpose as an admission against interest. No party shall be bound [by statement or act] said or done at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement. Federal Rule of Evidence 408 applies herein.

General Order No. 145, United States Bankruptcy Court, Southern District of California, *reprinted in* STEVEN HARTWELL & GORDON BERMANT, ALTERNATIVE DISPUTE RESOLUTION IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA 71 (1988). Where such local rules have not yet been adopted, parties often request the court to include a privilege provision as part of the order referring the matter to ADR. *See* Izard et al., *supra* note 28, at 296-297.

[64] *See* Lomax, *supra* note 4, at 77.

[65] FED. R. EVID. 501.

[66] *See* Lomax, *supra* note 4, at 77. In *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987), the plaintiff's attorney, in a case involving arrest, strip search, imprisonment and suicidal death, appeared as ordered for a summary jury trial, but refused to proceed with the selection of the jury. He argued that participation in the trial would force him to disclose privileged attorney work product. He had obtained statements from twenty-one witnesses, that had been denied to the defendants on a motion to compel after discovery had closed on the ground that they had failed to establish the substantial need and undue hardship required to overcome the qualified work product immunity. The Seventh Circuit found that the plaintiff's participation in the summary jury trial would "affect seriously the well-established rules concerning discovery and work product privilege" and vacated the lower court's judgment of contempt for refusal to participate. *Id.* at 888.

4. *Public Access*

A related issue is whether the First Amendment right of access to judicial proceedings applies to ADR.[67] The Supreme Court applies a two pronged test when the media asserts the right to attend judicial proceedings: (1) Is the proceeding one for which there is a "tradition of accessibility;" and (2) Does public access play a "significant positive role in the functioning of the particular process in question?"[68] Most courts deny access to the public and press during ADR proceedings, reasoning that such proceedings are analogous to settlement negotiations which historically have been closed.[69]

5. *Rulemaking Authority*

Under 28 U.S.C. § 2071, district courts "may from time to time prescribe rules for the conduct of their business."[70] Federal Rule of Civil

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[67] *See* Kaufman, *supra* note 25, at 35-36; Menkel-Meadow, *supra* note 16, at 25-30.

[68] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-606 (1982)). In addressing whether access would play a significant positive role in the functioning of ADR, it is necessary to consider whether the practice furthers a substantial government interest "unrelated to the suppression of expression" and whether the limitation of First Amendment freedoms is no greater than is necessary to the protection of the particular government interest involved. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) (quoting Procunier v. Martinez, 416 U.S. 396, 412 (1974)).

[69] *See* Kaufman, *supra* note 25, at 16; Menkel-Meadow, *supra* note 16, at 25-30. In *Cincinnati Gas and Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904-905 (6th Cir. 1988), *cert. denied sub nom. Cincinnati Post v. General Elec. Co.*, 489 U.S. 1033 (1989), the court denied public access to a summary jury trial reasoning that "allowing access would undermine the substantial governmental interest in promoting settlements, and would not play 'a significant positive role in the functioning of the particular process in question.'" *Id.* at 904-905.

In *News-Press Publishing Co. v. Lee County*, 570 So. 2d 1325 (Fla. 1990), a state court proceeding involved several local government entities over the sitting of a proposed bridge. The trial judge ordered the parties to mediate. A local newspaper filed a motion to open the closed mediation on the grounds that Florida's Sunshine Law required that meetings of local governmental entities be open to the public. The parties to the mediation argued that Florida's mediation statute guaranteed confidentiality to the parties. The judge agreed and denied the motion to open the mediation proceeding. He reasoned that no final settlement needed to be reached at the mediation meeting, thereby obviating the requirements of the Sunshine Law.

[70] 28 U.S.C. § 2071 provides:

> (a) The Supreme Court and all courts established by Act of Congress may from

Procedure 83, implementing 28 U.S.C. § 2071, permits district courts to make rules "not inconsistent with" the Federal Rules of Civil Procedure.[71]

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time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 U.S.C. § 2071 (1994).

[71] FED. R. CIV. P. 83 provides:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

In *Colgrove v. Battin*, 413 U.S. 149, 164 (1973), the Supreme Court upheld a local rule providing for six-person rather than twelve-person juries in civil cases, reasoning that the change in the number of jurors was not a "basic procedural innovation." Furthermore, the

Federal Rule of Civil Procedure 16 authorizes federal district courts to manage their own caseload by taking control of litigation, affecting scheduling orders and participating in settlement discussions.[72] Rule 16(c)(9) provides that at any conference conducted under Rule 16 the court may take action with respect to settlement and the use of special procedures to assist in resolving a dispute, when authorized by statute or local rule.[73] Until 1993, Rule 16 referred to the possibility of settlement and the use of extra-judicial procedures to resolve the dispute.[74] The Advisory Committee Note to the 1993 amendments to Rule 16 clarifies that the added reference to statute and local rules is not intended to erode inherent powers the court may have.[75]

Court held that the local rule did not "bear upon the ultimate outcome of the litigation" and was not inconsistent with any provision of the national rules. Accordingly, the local rule was valid. Distinguishable is *Miner v. Atlas*, 363 U.S. 641 (1960), in which the Supreme Court struck down a local rule providing for the taking of oral depositions in admiralty cases. The Court found the local rule inconsistent with the admiralty rules because the procedure for taking oral depositions had deliberately been omitted from those rules.

[72] FED. R. CIV. P. 16(a) provides:

> (a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
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> (1) expediting the disposition of the action;
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> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
>
> (3) discouraging wasteful pretrial activities;
>
> (4) improving the quality of the trial through more thorough preparation, and;
>
> (5) facilitating the settlement of the case.

FED. R. CIV. P. 16(a).

[73] FED. R. CIV. P. 16(c)(9) provides:

> (c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to
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> . . . .
>
> (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.

FED. R. CIV. P. 16(c)(9).

[74] FED. R. CIV. P. 16(c)(7), 461 U.S. 1097, 1102 (1983) (former rule effective Aug. 1, 1983).

[75] *See* Lomax, *supra* note 4, at 83 n.172. The Advisory Committee explains:

In addition to the authority granted by statute and the Federal Rules, the district courts also have the inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.[76] The "mere absence of language in the Federal Rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition."[77]

> Paragraph (9) [formerly (7)] is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. *See* 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651-658; Section 104(b)(2), Pub. L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

FED. R. CIV. P. 16(c) advisory committee's note to 1993 Amendments.

[76] *See* Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962). *See also* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition*, 69 CAL. L. REV. 770, 790 (1981) (suggesting that *Link* "set the tone for the extremely deferential attitude of the appellate courts toward the district court's authority to use pretrial procedures.").

[77] G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (*en banc*) (upholding a district court's authority to compel a party's attendance at a settlement conference and giving an expansive reading of a district judge's inherent power); *see Link*, 370 U.S. at 630-631 (holding that Rule 41(b) contains no negative implication prohibiting involuntary dismissal for non-prosecution when defendant has not so moved); *see also* FED. R. CIV. P. 83.

Inherent authority is not unlimited, however. The Sixth Circuit has held that inherent authority does not permit a district court to order a summary jury trial over objection of a party. In *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993), the Sixth Circuit stated:

> Requiring participation in a pre-trial conference, even if settlement is explored, is permitted . . . and justifiably so, for it may facilitate settlement at very little expense to the parties and the court. A jury trial, even one of a summary nature, however, requires at minimum the time-consuming process of assembling a panel and (one would hope) thorough preparation for argument by counsel, no matter how brief the actual proceeding. Compelling an unwilling litigant to undergo this process improperly interposes the tribunal into the normal adversarial course of litigation.

Id. at 158.

Thus, although the rulemaking basis for implementing ADR programs is not without controversy,[78] it is unlikely that any program will fail for inconsistency with the national rules.[79]

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[78] *Compare* Dayton, *supra* note 17, at 934 *with* Kaufman, *supra* note 25, at 31-33 *and* Levin & Golash, *supra* note 25, at 49. In *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1987), the Seventh Circuit held that Rule 16 could not be read as authorizing a mandatory summary jury trial. *See* discussion *supra* note 66. The Second Circuit has also ruled that Rule 16 "was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise." Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (rejecting the district court's use of sanctions to coerce parties to settle). However, three courts have expressly rejected the *Strandell* analysis. *See* Federal Reserve Bank v. Carey-Canada, 123 F.R.D. 603, 606 (D. Minn. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48-49 (E.D. Ky. 1988); Arabian Amer. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

[79] *See* Levin & Golash, *supra* note 25, at 51. Proposed Rule 16.1 would eliminate the problem and clarify the courts' authority, but it has never been passed. In 1986, Senator Mitch McConnell introduced S. 2038, 99th Cong. 2d Sess. (1986), a bill that would have amended the Federal Rules of Civil Procedure to include provisions authorizing alternative dispute resolution in the federal courts. S. 2038 provided in relevant part:

> Sec. 3(a) The Federal Rules of Civil Procedure are amended by inserting between Rule 16 and Part IV, the following:
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> Rule 16.1. Advice and Certification by Counsel
>
> (a) ALTERNATIVE DISPUTE RESOLUTION OPTIONS. -- At any time after 90 days and before 180 days after service of summons, each attorney who has made an appearance in the case and who represents one or more of the parties to the action shall, with respect to each party separately represented, advise the party of the existence and availability of alternative dispute resolution options, including extra-judicial proceedings such as mini-trials, and third party mediation, court supervised arbitration, and summary jury trial proceedings.
>
> (b) Notice. Each such attorney shall, not later than 180 days after an action is commenced, file notice with the court certifying that the attorney has so advised his client or clients, and indicating whether his client will agree to one or more of the alternative dispute resolution techniques.
>
> (c) Order by the Court. In the event all parties to an action agree to proceed with one or more alternative dispute resolution proceedings, the court shall be notified of such acceptance of such offer and shall enter an appropriate order governing the conduct of such alternative proceedings. Entering an order governing such further proceedings shall constitute a waiver by each party subject to the order of the right to proceed further in court.
>
> (d) Decision Inadmissible. Neither the acceptance nor the refusal of any party to the action to engage in such alternative dispute resolution proceedings shall be admissible as evidence in any further proceedings in such action. In the event an offer

III. ADR IN THE BANKRUPTCY COURTS

A. *Legislation*

Jurisdictionally, bankruptcy courts are units of the federal district courts with authority to enter orders and judgments in all cases arising under the Bankruptcy Code, as well as all proceedings arising under or relating to such a case.[80] Accordingly, the CJRA's grant of authority to the district courts to "refer appropriate cases to dispute resolution programs . . . including mediation, minitrial and summary jury trial" can be read as granting authority to the bankruptcy courts to utilize alternative dispute resolution programs.[81]

In addition, the Bankruptcy Code provides the bankruptcy court with the inherent authority to control pending litigation.[82] Such inherent

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made pursuant to this rule is rejected, the court shall proceed with the action as if no such offer had been made.

Litigation Abuse and Reform Act of 1986: Hearings on S. 2038 and S. 2046 Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 292-308 (1986).

[80] 28 U.S.C. § 151 provides that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151 (1993). 28 U.S.C. § 157(b)(1) provides that bankruptcy judges "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(b)(1) (1993).

[81] Lomax, *supra* note 4, at 82.

[82] *See* 11 U.S.C. §§ 105(a) & 105(d) (1993). Section 105(d) of the Bankruptcy Code, added by the Bankruptcy Reform Act of 1994, provides:

> The court, on its own motion or on the request of a party in interest, may:
>
> (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
>
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically . . . .

11 U.S.C. § 105(d) (1994). *See also* 11 U.S.C. § 1104 (1993) (providing for the appointment of a trustee or examiner when a debtor seeks to reorganize under Chapter 11 of the Bankruptcy Code). Some courts have used the statutory provisions concerning the appointment of an examiner to appoint an examiner/mediator to provide mediation services. *See, e.g., In re* UNR Indus., Inc., 72 B.R. 789 (Bankr. N.D. Ill. 1987) (appointing an

authority may be relied upon as a basis for implementing alternative dispute resolution.[83]

The Bankruptcy Code does not specifically provide for any form of ADR. However, Bankruptcy Rule of Procedure 9019(c) provides that "on stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration."[84]

The Bankruptcy Rules also provide authority for bankruptcy courts to utilize mediation and other forms of ADR.[85] Bankruptcy disputes are divided into "adversary proceedings"[86] and "contested matters."[87] Bankruptcy Rule of Procedure 7016 expressly incorporates Federal Rule of Civil Procedure 16 in adversary proceedings. As noted above, Rule 16(c)(9) provides that the court may use special procedures to assist in resolving

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examiner to determine whether negotiations of consensual plan of reorganization were at an impasse).

[83] *See* Lomax, *supra* note 4, at 83. The Sixth Circuit has held that inherent authority does not permit a district court to order a summary jury trial over objection of a party. *In re* NLO, Inc., 5 F.3d 154, 158 (6th Cir. 1983). The drafters of the 1993 Amendments to Federal Rule of Civil Procedure 16 intentionally did not take a position on the inherent power question. FED. R. CIV. P. 16(c)(9) advisory committee's note.

[84] FED. R. BANKR. P. 9019(c).

[85] *See* Lomax, *supra* note 4, at 82.

[86] FED. R. BANKR. P. 7001 defines adversary proceedings as follows:

> An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

FED. R. BANKR. P. 7001.

[87] Contested matters are defined as those disputes not defined in Rule 7001. *See* FED. R. BANKR. P. 7001; FED. R. BANKR. P. 9014, advisory committee's note ("Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter.").

disputes where "authorized by statute or local rule."[88] Contested matters are not automatically covered by Bankruptcy Rule 7016. However, the bankruptcy court has the discretion to apply the rule to a contested matter to authorize the use of ADR.[89]

B. *ADR in Practice in the Bankruptcy Courts*

In bankruptcy courts, as in federal district courts, the principal forms of ADR are arbitration and mediation.

1. *Arbitration*

Bankruptcy Rule of Procedure 9019(c) provides that, on stipulation of the parties to any controversy affecting the estate, the court may submit the matter to final and binding arbitration. Under this rule, any adversarial proceeding or contested matter may be submitted to arbitration.[90]

Arbitration can also arise under the rule where a pre-petition contract provides that disputes between the debtor and a third party shall be resolved by arbitration.[91] The principal issue in these cases is the enforceability of pre-petition arbitration agreements and resolution of disputes arising under those agreements, rather than the resolution of bankruptcy issues per se.[92]

As with arbitration generally, proceedings under Bankruptcy Rule 9019(c) involve a neutral third party who hears the evidence and renders a binding and enforceable decision. The nature and scope of the arbitration proceeding are governed by the parties' stipulation.[93] The process is

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[88] FED. R. CIV. P. 16(c)(9). *See* discussion *supra* note 75.

[89] FED. R. BANKR. P. 9014 lists the rules from Part VII that are automatically applicable in contested matters and does not list Rule 7016 as one that applies. However, Rule 9014 also provides that the court may at any stage in a matter direct that one or more of the other rules in Part VII shall apply.

[90] *See* FED. R. BANKR. P. 9019(c).

[91] *See* Lomax, *supra* note 4, at 62. *See also supra* notes 29-35 and accompanying text.

[92] *See, e.g.*, Hays and Co. v. Merrill Lynch, 885 F.2d 1149 (3d Cir. 1989); *In re* Al-Cam Dev. Corp., 99 B.R. 573 (Bankr. S.D.N.Y. 1989). In *Hays*, the court held that the trustee was not bound by the arbitration clause because the trustee's claims were not derived from the debtor's contractual agreement, but instead were derived from the trustee's strong arm powers under 11 U.S.C. § 544(b). The court held that the "trustee is bound by the arbitration clause . . . with respect to claims it inherited from the debtor, though not with respect to its other claim." *Hays*, 885 F.2d at 1155. *See also* Izard et al., *supra* note 28, at 291 n.1; Lomax, *supra* note 4, at 62-67.

[93] Issues usually covered in the stipulation include selection of the arbitrator, costs of the proceeding, procedures, discovery, applicable evidentiary rules, applicable substantive law,

permissive in that the parties to the dispute must contract or agree to arbitration before it is authorized by the court.[94]

In contrast, a few jurisdictions have adopted court-annexed arbitration that requires arbitration of certain disputes.[95] These arbitration proceedings also involve a neutral third party who renders a decision on the evidence. However, they are nonbinding and allow for trial de novo before the bankruptcy court on appeal.[96]

2. *Mediation*

Mediation is not covered by Bankruptcy Rule 9019. Authority for mediation programs is derived from statute, other rules of procedure and the court's inherent power.[97] The first bankruptcy mediation program was established in 1986 in the Bankruptcy Court for the Southern District of California.[98] Several other districts have since adopted mediation programs.[99]

At the bankruptcy level, as well as at the district court level, mediation is a means of facilitating a settlement. The mediator clarifies the issues, points out the strengths and weaknesses of the opposing positions and brings the parties together. Mediation is particularly valuable in bankruptcy, where the parties must often continue to work together following resolution of a dispute.[100]

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binding nature of the decision and the scope of review. *See* Izard et al., *supra* note 28, at 292.

[94] *See* Lomax, *supra* note 4, at 62.

[95] For example, the Eastern District of Pennsylvania requires arbitration of adversary proceedings that allege claims for damages not in excess of $100,000. *See* Izard et al., *supra* note 28, at 292 n.2 (citing Rule 8 of the Local Rules of Bankruptcy Procedure for the Eastern District of Pennsylvania).

[96] Because they are nonbinding, these proceedings are not covered by FED. R. BANKR. P. 9019(c).

[97] *See* Lomax, *supra* note 4, at 69. *See supra* notes 11-17 and accompanying text.

[98] *See* HARTWELL & BERMANT, *supra* note 63, at 1.

[99] *See Mediation: Boon or Bane?*, WEEKLY NEWS AND COMMENT (BCD) Feb. 11, 1993, at A1. The other districts include: (1) the Northern District of Alabama, (2) the Northern District of California, (3) the Central District of California, (4) the Southern District of California, (5) the Middle District of Florida, (6) the Southern District of Florida, (7) the Northern District of Indiana, (8) the Southern District of New York, (9) the Western District of Oklahoma, (10) the District of Oregon, (11) the Eastern District of Pennsylvania, (12) the Eastern District of Virginia and (13) the Eastern District of Michigan. The ABA and the ABI are also drafting model rules for mediation. *See ABI Assists Bankruptcy ADR Project*, ABI JOURNAL, Jan. 1993, at 36.

[100] *See* Izard, et al., *supra* note 28, at 295-296.

C. *Criticism of ADR in the Bankruptcy Courts*

ADR in the bankruptcy courts suffers the same problems as ADR in the district courts.[101] In addition, ADR in the bankruptcy courts raises several unique issues including the statutory requirements for approval of settlements and conflicts of interest.

1. *Approval of Settlements*

In any bankruptcy case, the debtor or a representative of the estate may be involved in a variety of litigation. Such litigation may range from simple two-party disputes to recover money or property to complex mass tort actions involving thousands of parties.[102] Much of this litigation is settled. Such settlements affect the amount of funds available for distribution to creditors and must be approved by the court after notice to creditors.

Bankruptcy Rule 9019(a) requires that a compromise or settlement be approved by the bankruptcy court after notice and a hearing.[103] Bankruptcy Rule 2002(a)(3) requires not less than twenty days notice to all creditors of a hearing on approval of a compromise or settlement, unless the court for cause directs otherwise.[104]

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[101] *See supra* notes 97-100 and accompanying text.

[102] *See, e.g., In re* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987) (involving numerous asbestos claims).

[103] Rule 9019(a) provides a procedure for court approval of settlements:

> (a) Compromise. On motion by the trustee and after a hearing, and notice to creditors the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entities as the court may direct.

FED. R. BANKR. P. 9019(a).

[104] Rule 2002(a)(3) provides:

> (a) Twenty-day Notices of Parties in Interest. Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . the hearing on approval of the compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent.

FED. R. BANKR. P. 2002(a)(3). "For cause shown," the court may direct that notice not be sent or that only certain creditors be notified. *See* COLLIER ON BANKRUPTCY ¶ 9019.03 (Lawrence P. King ed., 15th ed. 1993); *see also In re* Grant Broadcasting, 71 B.R. 390

Settlements are evaluated under a "fair and equitable standard."[105] The bankruptcy court must consider four factors in determining whether to approve a settlement: (1) the probability of success of the litigation; (2) the difficulties, if any, to be encountered in collecting on any judgment; (3) the complexity of the litigation involved and the expense, inconvenience and delay attendant to it; and (4) the paramount interests of the creditors with proper deference to their reasonable views in the circumstances.[106] The overriding concern of the bankruptcy court is to protect the best interests of the estate.[107]

When a debtor or a representative of the estate files many cases, Bankruptcy Rule 9019(b) provides a procedure that allows them to settle disputes without filing a separate motion for approval each time a settlement is reached.[108] The court may separate controversies into designated classes

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(Bankr. E.D. Pa. 1987).

[105] Protective Comm. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968); *see also* Martin v. Kane (*In re* A & C Properties), 784 F.2d 1377 (9th Cir. 1989), *cert. denied*, 479 U.S. 854 (1986).

[106] *See Anderson*, 390 U.S. at 418; *Martin*, 784 F.2d at 1381 (9th Cir.1989); American Can Co. v. Herpel (*In re* Jackson Brewing Co.), 624 F.2d 605, 607-608 (5th Cir. 1980); Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir. 1929); Blond v. Balaber-Strauss (*In re* Tampa Chain Co.), 70 B.R. 25 (S.D.N.Y. 1987); *In re* Neshaminy Office Bldg. Assoc., 62 B.R. 798 (E.D. Pa. 1986); Magill v. Springfield Marine Bank (*In re* Heissinger Resources Ltd.), 67 B.R. 378 (C.D. Ill. 1986); Estate of Patel v. Patel (*In re* Patel), 43 B.R. 500 (N.D. Ill. 1984); *In re* Bell & Beckwith, 77 B.R. 606 (Bankr. N.D. Ohio) *aff'd*, 87 B.R. 472 (N.D. Ohio 1987); *In re* Hermitage Inn, Inc., 66 B.R. 71 (Bankr. D. Colo. 1986); *In re* Lion Capital Group, 49 B.R. 163 (Bankr. S.D.N.Y. 1985); Providers Benefit Life Ins. Co. v. Tidewater Group, Inc. (*In re* Tidewater Group, Inc.), 13 B.R. 764 (Bankr. N.D. Ga. 1981).

[107] *See* In re Neshaminy Office Bldg. Assoc., 62 B.R. at 803 ("The court must determine whether the proposed settlement is in the best interest of the estate."); *see also In re* Bell & Beckwith, 77 B.R. at 606 (In addressing the objections of several creditors, the court stated that the creditors' objections must be given "due deference," but such objections are not controlling. The function of the hearing was not to resolve the various issues of law and fact raised by the objecting creditors. Instead, the court wanted to be certain that it would be making "an informed decision on the reasonableness of the settlement." *Id.* at 612. The court believed the settlement to be in the best interest of the estate and approved it.).

Appellate review of a bankruptcy court's decision to approve or disapprove a settlement and set aside the decision is based on abuse of discretion. *See, e.g.*, Continental Airlines, Inc. v. Airline Pilots Ass'n (*In re* Continental Airlines Corp.), 907 F.2d 1500 (5th Cir. 1990); *In re* Neshaminy Office Bldg. Assoc., 62 B.R. at 804 (district court concluding that the bankruptcy court abused its discretion when it approved a settlement "without a sufficient evidentiary basis for an independent assessment of its reasonableness.").

[108] Rule 9019(b) provides:

and establish guidelines within which a reasonable settlement must fall. If the settlements are within the bounds of the court's guidelines, the settlements are approved without further hearing or notice.[109] Otherwise, approval must be sought under Bankruptcy Rule 9019(a).[110]

Rules 9019(a) and (b) pose several challenges for the successful implementation of ADR in the bankruptcy courts. First, an arbitrator or mediator must be familiar with the factors the bankruptcy courts consider when ruling on a motion to compromise in order to guide negotiations and make adequate findings.[111] Second, meeting the standards for approval under Rule 9019 may require substantial disclosure of the facts and circumstances of the ADR proceeding.[112] Finally, although the parties involved may reach agreement, they must realize that the settlement may not be approved based on objections by creditors.[113]

2. *Conflicts of Interest*

The Bankruptcy Code and Rules establish procedures for the appointment and compensation of professional persons who may facilitate the reorganization or liquidation of the debtor.[114] The debtor, trustee, creditors' committee or equity security holders' committee, may employ, subject to court approval, professional persons to assist them in carrying out

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(b) Authority to Compromise or Settle Controversies Within Classes. After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

FED. R. BANKR. P. 9019(b).

[109] *See id.*

[110] *See* COLLIER ON BANKRUPTCY, *supra* note 104, ¶ 9019.04, at 9019-7.

[111] *See* Lomax, *supra* note 4, at 87–88.

[112] *See* Izard et al., *supra* note 28, at 297. A challenging problem for the bankruptcy practioner is to craft a framework for disclosure that enables a settlement to be approved and yet not harm the client in the event the settlement is not approved and litigation must commence. *See id.* at 297–298.

[113] *See id.*

[114] *See* 11 U.S.C. §§ 327–330 (1993) (governing the employment and compensation of professional persons); 11 U.S.C. § 1104 (1993) (governing the appointment of trustees and examiners); FED. R. BANKR. P. 2002 (notice provisions); FED. R. BANKR. P. 2014 (employment of professional persons); FED. R. BANKR. P. 5002 (restrictions on approval of appointments); FED. R. BANKR. P. 5004 (disqualification provisions); and FED. R. BANKR. P. 9019 (governing compromise and arbitration).

their duties.[115] The professionals are compensated from the estate.[116] Hence, they must "not hold or represent an interest adverse to the estate," and they must be "disinterested."[117] The bankruptcy court must approve the compensation to the professional for actual, necessary services rendered and actual, necessary expenses.[118] Compensation may be denied if, during the course of the proceeding, the professional becomes an interested person or

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[115] *See* 11 U.S.C. § 327 (1993).

[116] *See* 11 U.S.C. § 328(a); 11 U.S.C. §§ 328(a), 330 (1993).

[117] 11 U.S.C. § 327(a). "Disinterested person" is defined in § 101(14) as a person that:

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not an investment banker for any outstanding security of the debtor;
>
> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
>
> (D) is not and was not, within two years before the date of the filing of the petition a director, officer or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
>
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

11 U.S.C. § 101(14) (1993).

[118] *See* 11 U.S.C. §§ 327-330. As amended in 1994, 11 U.S.C. § 330(a)(3) provides the following:

> (3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including -
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
>
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3) (1994).

incurs an interest adverse to the estate.[119]

The Bankruptcy Code and Rules do not explicitly address the appointment and compensation of mediators or arbitrators. Nevertheless, as professional persons, they are implicitly included.[120] Thus, an attorney or other professional whose firm is already involved in a bankruptcy case is precluded from serving as a mediator or arbitrator for other parties involved in a dispute.[121]

Accordingly, ADR programs must have a procedure by which mediators or arbitrators make an initial investigation of potential conflicts.[122] Potential problems with conflicts of interest also suggest the need for a pool of neutrals that is large enough to support a bankruptcy ADR program without conflict issues arising frequently.[123]

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[119] *See* 11 U.S.C. § 328(c). Numerous additional bankruptcy rules govern the employment and compensation of professional persons. For example, the clerk must give interested parties at least twenty days notice of "hearings on all applications for compensation or reimbursement of expenses totalling in excess of $500." FED. R. BANKR. P. 2002(a)(7). Parties seeking to employ professional persons must file an application containing information concerning the necessity for the employment, reason for selecting the particular professional, the services to be rendered, compensation arrangements and any connections the professional may have with other parties involved in the bankruptcy. *See* FED. R. BANKR. P. 2014(a).

[120] *See* Lomax, *supra* note 4, at 85 (citing 11 U.S.C. §§ 327–330, 1104; FED. R. BANKR. P. 2002, 2014, 502, 504, 9019).

[121] *See id.*, at 77.

[122] *See id*, at 77; Richard E. Fehling & James E. O'Neill, *ADR Arrives in Bankruptcy Court*, BUS. LAW., June 3, 1994, at 11.

[123] *See* HARTWELL & BERMANT, *supra* note 63, at 38. In their study of the ADR program in the Bankruptcy Court for the Mediation Program in the Southern District of California, they wrote:

> During the period of the study, twenty-nine individuals served as mediators. Nine served once, eight served twice, three served three times, six served four times, and the remaining three served five, eight, and nine times each. As mentioned in the chapter on method, the court altered the method of mediator selection when it discovered that a relatively small number of mediators were being oversubscribed.
>
> Another feature of the panel, perhaps not surprising given the method of its selection, is that some of its members also appeared as advocates in proceedings that went to mediation. The degree of overlap appeared to be approximately one-third; that is, during the study approximately one-third of the lawyers who had served as mediators had also been advocates in a proceeding that went to mediation. A smaller number of mediators are also members of the panel of Chapter 7 trustees.
>
> We mention these overlapping roles to emphasize that there would appear to be a minimum size of the active or "elite" bankruptcy bar that is required to support a program such as this one. Beneath that minimum size, the degree of overlap of roles

IV. BANKRUPTCY DISPUTES APPROPRIATE FOR ADR

Approximately thirteen bankruptcy courts have court-annexed ADR programs.[124] Other bankruptcy courts use ADR on an ad hoc basis.[125]

There are a number of different views about which categories of dispute are most amenable to successful ADR.[126] Bankruptcy courts have successfully utilized ADR to resolve single creditor claims.[127] Courts have

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might create a problem of conflict or the appearance of conflict."

Id. Some conflicts may be remedied by Chinese walls or avoided by consent of the parties. In *In re* R.H. Macy & Co., No. 92-B-40477 (Bankr. S.D.N.Y. Feb. 22, 1994), United States Bankruptcy Judge Burton R. Lifland appointed Cyrus R. Vance (a partner at New York's Simpson, Thatcher & Bartlett law firm) to mediate the fight over the Macy reorganization plan. Mr. Vance was appointed even though Simpson, Thacher was the primary outside counsel for Chemical Bank, a creditor bank. *See* Karen Donovan, *Macy's Mediation Signals New Push on Reorganizations*, NAT'L L.J., March 7, 1994, at 21. In *In re* Olympia York Realty Corp., No. 92-B-42698 (Bankr. S.D.N.Y. May 28, 1993). Simpson, Thacher represented Chemical Bank as a creditor and Mr. Vance was employed as an examiner to resolve a dispute involving the makeup of Olympia York's reconstituted board. To avoid a conflict of interest, Simpson, Thacher set up a Chinese wall separating lawyers who represented Chemical Bank from those who represented Mr. Vance in his capacity as examiner. The arrangement was approved by U.S. Bankruptcy Judge James L. Garrity, Jr. of the Southern District of New York. *See id.*

[124] *See* discussion *supra* note 99.

[125] *See* Ralph Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Basis for the Use of Mediation and Other Forms of ADR*, 46 S.C. L. REV. 1259, 1266 (1995).

[126] *See* Lomax, *supra* note 4, at 73. Hartwell and Bermant's study of California mediation programs identified the following indicia of proceedings suitable for mediation:

> Enough discovery has been completed (or little discovery is necessary) so that the factual positions of the parties are mutually understood; the bankruptcy rules do not place extraordinary calendaring demands on the disposition of the case; the disposition of the case turns on the facts rather than on an interpretation of the law; the dispute is over an amount of money owed; the attorneys perceive that mediation will save their clients money and that their clients are more likely to consider a settlement if they hear their position evaluated by an apparently competent and objective third party; and one or both parties are, for whatever reason, reluctant to go to trial.

HARTWELL & BERMANT, *supra* note 63, at 22.

[127] *See id*; Mabey et al., *supra* note 125, at 1264 n.9.("The most notable impact of ADR in bankruptcy programs is in the resolution of many smaller adversary proceedings through the use of unpaid or nominally paid mediators."). *See, e.g.*, *In re* M Corp. Financial,

also used ADR to resolve and liquidate multiple claims, to achieve consensual plans of reorganization and to "harmonize" international bankruptcy disputes.

A. *Claims Resolution*

1. *Tort Claims*

Numerous courts have implemented claims resolution procedures, using ADR techniques with claims of a similar nature, to permit the proposal of a plan of reorganization.[128] *NLRB v. Greyhound Lines*[129] was the first case to employ ADR procedures to resolve disputed claims in advance of confirmation of a plan.[130]

Participation in *Greyhound*'s ADR procedure was voluntary; claimants had the option of mediating or liquidating their claims pursuant to the provisions of the Bankruptcy Code. A claimant who selected the ADR procedure was required to provide the debtor with a standardized confirmation of loss form. Within thirty days of receipt of the form, the debtor was required to request additional information, deny liability, allow the claim in full, make an offer to settle the claim or request mediation. If the debtor denied liability, the claim was referred to mediation. Following referral of a claim to mediation, the parties would submit a confidential statement outlining their position on settlement. The mediator would then meet with the parties, jointly and individually, to facilitate settlement. If the disputed claim was not resolved within sixty days, the claimant had the

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Inc., 160 B.R. 941, 947 (Bankr. S.D. Tex. 1990) (successful mediation of $50 million claim involving real property base); *In re* Hunt, Adv. No. 391-3331, Case No. 388-35726 (Bankr. N.D. Tex. April 20, 1994) (appointment of a mediator to facilitate settlement of an adversary proceeding); cases discussed in HARTWELL & BERMANT, *supra* note 63.

[128] *See* Mabey et al., *supra* note 125, at 1273 n.41. *See, e.g., In re* Herman's Sporting Goods, Inc., 166 B.R. 581 (Bankr. D.N.J. 1993) (approving an ADR procedure for resolution of personal injury and product liability claims); *In re* Child World, Inc., 147 B.R. 847 (Bankr. S.D.N.Y. 1992) (authorizing a standing ADR procedure for resolving certain tort and insurance claims, including the use of a mediator). *See also* Michael Sirota & Ilana Volkov, *ADR Can Help a Chapter 11 Debtor*, N.J. L.J., Jan. 17, 1994, at 27; Richard N. Tilton & Kenneth M. Lewis, *Alternative Dispute Resolution*, N.Y. L.J., Jan. 6, 1994, at 5; Robert E. Nies, *ADR Fosters Kinder, Gentler Bankruptcies*, N.J. L.J., Jan. 16, 1995, at 6.

[129] *In re* Eagle Bus Mfg., Inc., 134 B.R. 584 (Bankr. S.D. Tex. 1991), *aff'd sub nom*, NLRB v. Greyhound Lines, Inc. (*In re* Eagle Bus Mfg., Inc.), 158 B.R. 421 (S.D. Tex. 1993) (confirming reorganization plan).

[130] *See* Carolyn M. Penna, *The Greyhound ADR Program*, N.Y. L.J., Dec. 13, 1990, at 3.

option of proceeding to binding arbitration or filing a motion seeking relief from the automatic stay to liquidate the disputed claim in a nonbankruptcy forum.[131] *Greyhound* resolved 95% of the more than 3,200 pre-petition tort claims through ADR.[132]

2. *Contract Claims*

Although the majority of claims resolution procedures involve tort claims,[133] ADR procedures have been implemented by the bankruptcy courts to resolve contract claims as well.[134]

In *In re Columbia Gas Transmission Corporation*,[135] the debtor rejected gas purchase contracts immediately after filing for bankruptcy. Rejection of the contracts triggered "rejection damages" for the debtor's failure to perform its obligations under the contracts. Prior to the bankruptcy filing, Columbia Gas estimated that rejection of the contracts would result in damages of $1.6 billion. However, when the bankruptcy claims for rejection of the gas contracts were totaled, the amount exceeded $15 billion. Concerned that fixing the amount of such claims would threaten the viability of the reorganization, Columbia Gas moved to establish a comprehensive estimation procedure for the fixing of rejection damage claims. A claims mediator was appointed and charged with formulating a procedure to allow for the fair and cost effective estimation of the rejection damages claims.[136]

The procedures adopted required the mediator to prepare recommendations for the court on the legal and factual issues common to the claims. While the court considered the recommendations, the claimants

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[131] *See* Tilton & Lewis, *supra* note 128, at 5 n.11 (citing Findings of Fact and Conclusions of Law in Connection with Order Establishing Procedures for Processing Motions for Relief from the Automatic Stay Filed by Personal Injury and Property Damage Claimants, Approving Amended Alternative Dispute Resolution Procedure, and Denying Objections to the Indemnitee Stay Order, *In re* Eagle Bus Mfg., Inc., Nos. 90-00985-B-11 to 90-00900-B11, Jointly Administered under 90-00985-B-11 (Bankr. S.D. Tex. 1991)). *See also* Penna, *supra* note 130, at 3.

[132] *See* Tilton & Lewis, *supra* note 128, at 5 (citing telephone interview with Weil, Gotshal & Manges, attorneys for Greyhound (Dec. 30, 1993)).

[133] *See id.*

[134] *See, e.g., In re* Columbia Gas Transmission Corp., No. 91-804 (Bankr. D. Del. Aug. 27, 1992) (discussed *infra*); *In re* U.S.H. Corp. of New York, Ca. 11 Case No. 91-B-11625 (Bankr. S.D.N.Y. Dec. 1992) (court appointed mediator to help resolve approximately twenty multimillion dollar construction related claims).

[135] No. 91-804 (Bankr. D. Del. Aug. 27, 1992).

[136] *See* Nies, *supra* note 128, at 6.

applied the recommendations to recalculate their claims. If the debtor objected to the recalculated claim, the parties and the mediator would determine what further proceedings were necessary. If the debtor reached a settlement with the claimants, the mediator reviewed the settlement to assess fairness. Finally, the mediator filed a report with the court detailing his recommendations and assessment of the proposed settlements.[137]

3. *Post-Confirmation Liquidation of Claims*

ADR has also been used to liquidate claims after the confirmation of a plan of reorganization.[138] One of the most cited examples of the use of ADR for claims resolution post-confirmation is *In re A. H. Robins Co.*[139] In *Robins*, the plan of reorganization established a trust fund to compensate parties injured by the Dalkon Shield intrauterine device. The plan also established a claims resolution procedure. The claims resolution procedure provided claimants with various options for seeking compensation for their injuries. If a claimant rejected all settlement offers, she could proceed with her case against the debtor by litigation or by binding arbitration.[140]

B. *Plan Disputes*

Bankruptcy courts also use ADR to effect consensual plans of reorganization and expedite the debtor's emergence from Chapter 11.[141] One of the highest profile appointments of a mediator in a bankruptcy proceeding occurred in *In re R. H. Macy and Co., Inc.*[142] In *Macy*, the judge *sua sponte* appointed attorney Cyrus Vance as a mediator to "develop and present to the court an agreement on the principal terms and conditions

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[137] *See* Mabey et al., *supra* note 125, at 1274 n.41. Following submission of the mediator's report, the court held a hearing on the compromise of the claim. The costs of mediation were paid by the debtor's estate. *See id.*

[138] *See id.* at 1275. *See, e.g.*, Kubicik v. Apex Oil Co. (*In re* Apex Oil Co.), 884 F.2d 343, 345 (8th Cir. 1989) (upholding a claims resolution procedure for the liquidation of personal injury and wrongful death claims); *In re* A.H. Robins Co., 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *see* discussion *infra*. *See also* Claudia MacLachler, *Apex Examiner's Role Is Bigger Than Usual*, NAT'L L.J., Oct. 8, 1990, at 44; Giangini M. Vairo, *The Dalkon Shield Claimants Trust: Paradium Lost (or Found)?*, 61 FORDHAM L. REV. 617, 628-631 (1992).

[139] 88 B.R. 742 (E.D. Va. 1988).

[140] *See id.*; *see also* Mabey et al., *supra* note 125, at 1277.

[141] *See* Mabey et al., *supra* note 125, at 1282-1283.

[142] No. 92-B-40477 (Bankr. S.D.N.Y. Feb. 22, 1994).

of a plan of reorganization."[143] A joint plan of reorganization, providing for the merger of the debtor with a competitor, was ultimately confirmed.[144]

C. *Differences in Insolvency Laws*

A less common, but fertile, area for the use of ADR in the bankruptcy courts is resolving conflicting international insolvency laws.[145] In *In re Olympia and York Realty Corp.*,[146] the debtor was subject to dual insolvency proceedings in the United States and Canada. The court appointed an examiner to establish a procedure to harmonize the Canadian and United States proceedings and achieve a consensus among the parties regarding the governance of the debtor. Eventually, a consensus was reached.[147]

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[143] Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Second Amended Plan of Reorganization for R.H. Macy & Co. and Certain of Its Subsidiaries, Oct. 27, 1994, *available* in LEXIS, Bankruptcy library, Macy file.

[144] *See* Mabey et al., *supra* note 125, at 1282–1283; Donovan, *supra* note 123, at 21. The mediator concluded:

> Bankruptcy reorganizations are important for our nation's economy—in terms of continuing viable and valuable business enterprises and in preserving jobs. How courts deal with bankruptcy is also important to the public's perception of our judicial system. I am convinced that mediation can and will facilitate the agreements that form the basis of the financial restructuring that must be at the core of any consensual reorganization. I believe that the mediation process can do so in a way that reduces the costs and delays that are sometimes negatively associated with bankruptcy.
>
> Your Honor's appointment of a mediator was indeed a bold move and one that has turned out to be very successful.

Notice of Conventional Filing of Final Report of Cyrus R. Vance, As Mediator, Pursuant to the Standing Mediation Order and the Mediation Order Entered in the Macy's Reorganization Cases, Dec. 13, 1994, *available* in LEXIS, Bankruptcy library, Macy file.

[145] *See* Mabey et al., *supra* note 125, at 1272 n.37.

[146] No. 92-B-42698 (Bankr. S.D.N.Y. May 28, 1993).

[147] *See* Mabey et al., *supra* note 125, at 1272 n.37. *See also In re* Maxwell Communications Corp., No. 91-B-15741(Bankr. S.D.N.Y. Jan. 15, 1992) (approving an examiner where debtor is subject to dual insolvency proceedings in the United States and Great Britain).

V. A CLOSER LOOK AT BANKRUPTCY MEDIATION: CHARACTERISTICS AND ADVANTAGES OF BANKRUPTCY COURT-ANNEXED MEDIATION

The majority of bankruptcy court ADR programs involve court-annexed mediation.[148] These programs have been established by local rule or general order.[149] Court-annexed mediation programs share common characteristics and provide certain advantages over litigation and arbitration.

A. *Advantages of Mediation*

Mediation provides a number of advantages over bankruptcy litigation. First, mediation results in savings.[150] The process is quicker than trial and attorneys spend less time in preparation particularly when mediation is conducted before the parties invest heavily in discovery.[151]

Second, mediation provides flexibility.[152] Mediation is not bound by procedural and evidentiary rules; parties are free to discuss peripheral aspects of the case that may lead to a broader and more effective settlement.[153] Furthermore, parties can develop solutions personally tailored to their needs.[154]

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[148] *See* Mabey et al., *supra* note 125, at 1262 n.4. The notable exception is the Bankruptcy Court for the Eastern District of Pennsylvania, where arbitration is required for all adversary proceedings seeking money damages less than $100,000. *See id.*

[149] *See id.* at 1278.

[150] *See* Lomax, *supra* note 4, at 79-80. One attorney participating in the California study estimated that the average cost of trying the simplest proceeding is $1,500, while his charges for mediating similar proceedings averaged $150. *See id.* Another attorney reported the cost savings of mediating a major case, in which trial costs were running over $1,000 a day at 80%. *See* HARTWELL & BERMANT, *supra* note 63, at 30.

[151] *See* Lomax, *supra* note 4, at 79-80; HARTWELL & BERMANT, *supra* note 63, at 30. *See also* Kaufman, *supra* note 25, at 22 (discussing mediation in the context of federal district court litigation); Izard et al., *supra* note 28, at 295 ("A key benefit to mediation is that the dispute can be resolved much more quickly and inexpensively than through judicial dispute resolution.").

[152] *See* Lomax, *supra* note 4, at 79. *See also* HARTWELL & BERMANT, *supra* note 63, at 31. In the California study, for example, a debtor agreed to pay a disputed debt and the creditor agreed not to record fraud on the credit report. *See id.*

[153] *See* Lomax, *supra* note 4, at 79; HARTWELL & BERMANT, *supra* note 63, at 31.

[154] *See* HARTWELL & BERMANT, *supra* note 63, at 31. Mediation also provides flexibility by allowing parties to meet where and when they choose, avoiding the rigid hours and busy location of the bankruptcy court. *See id.* At one complex mediation involving numerous parties, the following events were observed during a noon break:

Third, mediation is more effective in maintaining ongoing business relationships, which are important to a successful reorganization.[155] The nonadversarial nature of mediation can help minimize hostility and actually enhance ongoing relationships.[156]

Mediation provides similar advantages over arbitration. Mediation is less expensive than arbitration.[157] The cost of arbitration can range widely, depending on the amount of discovery and the structure of the arbitration.[158] Furthermore, mediation is a process which allows the parties to reach a consensus.[159] Arbitration does not depend on the willingness of the parties to work towards settlement or the ability of the arbitrator to assist the parties in identifying common ground. As a result, parties who arbitrate remain in an adversarial posture at the conclusion of the dispute affecting their relationship throughout the bankruptcy and the continuation of their business dealings.[160] Thus, the vast majority of bankruptcy court ADR programs involve mediation.

B. *Common Characteristics*

Bankruptcy court-annexed mediation programs share similar concerns: defining the scope of the program, setting the qualifications and compensation of the mediators, encouraging good faith participation in mediation and preserving confidentiality while meeting the demands of the Bankruptcy Code and Rules for court approval of settlements.[161]

> One of the participants devoted the noon hour to working out the details of proposed settlement with a subsidiary party by telephone in an adjoining office; three other participants returned to their offices to catch up on other work; and two key participants remained with the mediator to work on other aspects of the case.

Id.

[155] *See* Lomax, *supra* note 4, at 80; NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION 17, 35 (1989).

[156] *See* HARTWELL & BERMANT, *supra* note 63, at 30-31. One attorney in the California study reported that his clients chose mediation over trial even when he advised them they would most likely win at trial but would probably end up settling for a third of the disputed debt if mediated. Hartwell and Bermant conclude that "clients appreciate the opportunity mediation affords to speak without interruption and to talk directly to the opposition." *Id.*

[157] *See* Izard et al., *supra* note 28, at 299.

[158] *See id.*

[159] *See id.* at 298-299.

[160] *See id.*

[161] *See generally* Mabey et al., *supra* note 125.

1. *Scope of Mediation Program*

Generally all adversary proceedings and contested matters are potential subjects for mediation; the majority of programs do not limit the types of matters that may be submitted.[162] The court may use its discretion in deciding whether to refer a matter to mediation and retains the authority to withdraw it at any time.[163]

Further, the assignment of a matter to mediation will typically not operate as a stay of discovery, hearing or trial.[164] Most programs provide for mediation to be on a parallel track with the bankruptcy proceedings.[165]

2. *The Mediators*

Each bankruptcy mediation program sets forth minimum qualifications for mediators.[166] The first bankruptcy mediation program was established in 1986 in the Bankruptcy Court for the Southern District of California.[167] The program requires mediators to be attorneys, licensed to practice before both the California state courts and the federal court for the Southern District.[168] The attorneys must have been admitted to practice for at least four years and have either served as the attorney of record for at least three bankruptcy

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[162] *See id.* at 1280.

[163] *See id. See, e.g.*, General Order No. 93-1, United States Bankruptcy Court, District of Oregon, *reprinted in* A.B.A. SEC. BUS. LAW REP. *presented at* the Nat'l. Conf. B. J. (Oct. 6, 1994) (on file with author) [hereinafter A.B.A. Bankruptcy Materials]; General Order No. 117, United States Bankruptcy Court, Southern District of New York, *reprinted in* A.B.A. Bankruptcy Materials.

[164] *See* Mabey et al., *supra* note 125, at 1281.

[165] *See* Lomax, *supra* note 4, at 75 (citing *Mediation: Boon or Bane?*, *supra* note 99, at A. 5.).

Many jurisdictions will also set time limits on the mediation. For example, in the Southern District of California and in Virginia, the mediator sets a time and place that is convenient for the parties and gives them fifteen days written notice. The initial mediation conference must occur within the first forty-five days after the mediator has been contacted by the court. *See id.* at 76 (citing General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67). Mediation can be abused by those more interested in cheap discovery than in settlement. *See id.* at 81; HARTWELL & BERMANT, *supra* note 63, at 31–32. Requiring mediation to proceed on a parallel track with the litigation limits the opportunity for abuse.

[166] *See* Lomax, *supra* note 4, at 71.

[167] *See* HARTWELL & BERMANT, *supra* note 63, at 1; Lomax, *supra* note 4, at 70.

[168] *See* General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67.

cases or as the attorney of record for a party in interest for at least three adversary proceedings or contested matters.[169] The California system, unlike others, does not require any formal mediation training.[170] In contrast to the program in the Southern District of California, some programs permit non-attorneys to serve as mediators.[171] These programs require only that the mediator be a licensed professional.[172]

Bankruptcy mediation programs also differ in their treatment of compensation of mediators. Mediators in the Southern District of California receive no monetary compensation.[173] In those programs where the mediator does receive payment the parties generally share the costs, although the program may provide that the costs be charged to the estate subject to court approval.[174] The amount of compensation may be set per mediation or defined according to a schedule.[175]

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[169] *See id.* Other programs require a greater degree of experience. In Virginia, mediators must have served as the attorney of record in at least twenty bankruptcy cases or at least ten adversary proceedings or contested matters (no three of which are the same type). *See also* Lomax, *supra* note 4, at 71 (citing General Order No. 92-1-2, United States Bankruptcy Court, Eastern District of Virginia, Alexandria Division).

[170] *See* General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67. Most of the mediators participating in a study of the California mediation program believed that basic mediation skills could be acquired by observing judges conduct settlement conferences. *See* HARTWELL & BERMANT, *supra* note 63, at 34-35. However, programs in other jurisdictions require participation in a mediation training session. *See* Lomax, *supra* note 4, at 72. *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 94-1001-14, United States Bankruptcy Court, Eastern District of Pennsylvania, *reprinted in* A.B.A. Bankruptcy Materials, *supra* note 163.

[171] *See* Mabey et al., *supra* note 125, at 1279.

[172] For example, in Oregon, mediators may be engineers, accountants or other professionals with an approved amount of bankruptcy experience. *See* General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[173] *See* General Order No. 145, *supra* note 63, at 67. *See also* Mabey et al., *supra* note 125, at 1279; Lomax, *supra* note 4, at 73. Mediators who participated in the California study generally rejected the idea of compensation due to the concern that compensation might encourage mediators to prolong the proceedings. *See* HARTWELL & BERMANT, *supra* note 63, at 35.

[174] *See* Mabey et al., *supra* note 125, at 1279. Several jurisdictions simply provide that the "mediator's compensation shall be on such terms as are satisfactory to the mediator and the parties, and subject to court approval if the estate is to be charged with such expense." General Order No. 117, *supra* note 163, at 7. *See also* General Order No. 93-1, *supra* note 163.

[175] *See* Mabey et al., *supra* note 125, at 1279. For example, Middle District of Florida bankruptcy courts compensate mediators involved in large Chapter 11 cases by providing for

3. *Good Faith Participation in the Mediation*

Typically, the parties' attorneys are required to be present at the mediation and be prepared for good faith discussions on all issues including settlement position.[176] The bankruptcy court may also require the parties to attend.[177] Failure to attend and participate in good faith may result in court imposed sanctions.[178] These requirements are consistent with Federal Rule of Civil Procedure 16, requiring good faith participation in pretrial conferences.[179]

4. *Confidentiality and the Final Report*

All of the bankruptcy court-annexed mediation programs require the mediator to file a final report, limited to stating whether the parties complied with the mediation order and whether they reached a settlement.[180] If the mediation is successful, the parties must submit their agreement to the court for approval.[181]

With the exception of the mediator's final report, all writings, statements and actions relative to the mediation proceedings are confidential.[182] Federal Rule of Evidence 408 applies and local rules create privileges for documents and statements presented by the ADR

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an hourly rate for the mediator, deciding the maximum amount of compensation and splitting the costs between the two parties. *See* M.D. Fla. LOC. BANKR. R. 2.23(a)(2). *See also Mediation: Boon or Bane?*, *supra* note 99, at A8.

[176] *See* Mabey et al., *supra* note 125, at 1280; Lomax, *supra* note 4, at 75. *See, e.g.*, General Order No. 145, *supra* note 63.

[177] *See* Mabey et al., *supra* note 125, at 1280; Lomax, *supra* note 4, at 75. *See, e.g.*, General Order No. 94-1001-14, *supra* note 170; General Order No. 12, United States Bankruptcy Court, Northern District of California, *reprinted in* A.B.A. Bankruptcy Materials, *supra* note 163.

[178] *See* Mabey et al., *supra* note 125, at 1280; Lomax, *supra* note 4, at 75. *See, e.g.*, General Order No. 145, *supra* note 63.

[179] *See* FED. R. CIV. P. 16(f).

[180] *See* Mabey et al., *supra* note 125, at 1281-1282; Lomax, *supra* note 4, at 75-76. *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[181] The settlement must be approved pursuant to Bankruptcy Rule 9019. *See* FED. R. BANKR. P. 9019. *See* discussion *supra* note 103 and accompanying text.

[182] *See* Mabey et al., *supra* note 125, at 1281. Typically, the general order establishing the mediation program contains a clause that all writings and statements in the mediation process are privileged. *See, e.g.*, General Order No. 145, *supra* note 63, at 67. *See* discussion *supra* note 63 and accompanying text.

participants.[183]

VI. GUIDELINES FOR DEVELOPING LOCAL RULES ON BANKRUPTCY COURT-ANNEXED MEDIATION

A court authorized ADR program offers an opportunity for parties to settle legal disputes promptly, efficiently and to their mutual satisfaction.[184] Although ADR is beginning to enjoy national acceptance, many bankruptcy courts have yet to implement ADR programs.[185] Excuses for the failure to embrace ADR include unfamiliarity with ADR and the lack of clear ADR guidelines.[186]

Proposals to promote ADR focus on amending Bankruptcy Rule 9019 to facilitate court-annexed mediation.[187] Supporters of a national bankruptcy

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[183] *See* discussion *supra* note 63 and accompanying text.

[184] *See* Mabey et al., *supra* note 125, at 1263. *See also* Barbara Franklin, *ADR Meets Bankruptcy: Experts Explore Ways to Abbreviate the Process*, N.Y.L.J., April 22, 1993, at 5 ("ADR may, in a lot of cases, offer a more efficient resolution of controversies and disputes than litigation in the bankruptcy court."). *See also* discussion accompanying notes 150-160.

[185] *See* Mabey et al., *supra* note 125, at 1263 ("Few reported decisions grapple with the role of or authority for ADR in bankruptcy cases and proceedings, and the handful of appointments of examiners or mediators to assist in a plan or other complex negotiations rest largely on an *ad hoc* and ill-defined foundation.").

[186] *See* Mabey et al., *supra* note 125, at 1263-1264 n.8 (noting that the 1994 amendments to the Bankruptcy Code authorize the bankruptcy court to impose on parties in interest "such limitations and conditions as the court deems appropriate to insure that the case is handled expeditiously and economically" but provide no other ADR guidelines).

[187] Mabey et al., *supra* note 125, at 1309, offer the following amendments to Bankruptcy Rule 9019(c):

> C. ALTERNATIVE DISPUTE RESOLUTION
>
> (1) On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration *or to any other form of alternative dispute resolution.*
>
> (2) *The court, on its own motion or the motion of a party in interest or the United States Trustee, may order the parties to submit any controversy affecting the estate to mediation. Unless the court orders otherwise, the costs of the process, including the compensation of the appointed neutral, shall be borne equally by the parties. Unless the court orders otherwise for cause shown, the referral to mediation shall not stay other proceedings respecting the controversy.*

Id.

Lomax proposes amending Bankruptcy Rule 9019(c) to "provide the bankruptcy court

court-annexed mediation rule assert that it promotes formality, enforceability and uniformity.[188]

However, at its best, ADR is a process which meets the interests of litigants by realizing an outcome that is fairer, more sensitive to complex needs and more likely to be followed than litigation or arbitration.[189] It gives the parties control of their dispute and the power to formulate a working consensus rather than having their past failings decided upon by a third party without concern for future business relationships.[190] Rigid national rulemaking runs the risk of standardizing (and thus paralyzing) the very ADR programs that were designed to transform the judicial system into one more flexible and responsive to the needs of its constituents.[191]

The continued flexibility of ADR can be facilitated by a simple amendment to Bankruptcy Rule 9019, authorizing nonbinding ADR programs, including court-annexed mediation.[192] The actual terms of the mediation programs, however, are best left to the individual judicial districts.[193] Each district has distinct concerns. The numerous variables

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with unambiguous authority to establish court-annexed mediation programs" and establish "mediation as a permissive process." Lomax, *supra* note 4, at 89.

[188] *See* Mabey et al., *supra* note 125, at 1310 n.190.

[189] *See* Menkel-Meadow, *supra* note 16, at 12.

[190] *See id.*

[191] *See id.* at 45.

[192] Rule 9019(c) could simply be amended to provide (changes in italics):

> (1) On stipulation of the parties to any controversy affecting the estate, the court may authorize the matter to be submitted to final and binding arbitration.
>
> (2) *On stipulation of the parties to any controversy, or as otherwise provided by local court rule, the court may authorize the matter to be submitted to any form of alternative dispute resolution, including court-annexed mediation.*

This proposed rule has several advantages. First, it allows the individual districts to maintain control over when a matter shall be submitted to mediation and who shall bear the costs. Second, while specifically identifying court-annexed mediation, it provides the flexibility for the court to order other types of ADR, such as summary jury trials, early neutral evaluation and arbitration. Third, it is more consistent with federal district court practice, which provides for ADR by local rule.

[193] The principles of the Judicial Improvements Act include: building reform from the "bottom up," promulgating a national statutory policy in support of judicial case management and expanding and enhancing the use of alternative dispute resolution. *See* Lomax, *supra* note 4, at 89 (citing S. REP. NO. 416, 101st Cong., 1st Sess. 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6817). Allowing the individual judicial districts to formulate their own rules furthers the goal of building reform from the "bottom up" while expanding and enhancing the use of ADR.

include the skills of the bankruptcy bench, the size of the docket, the complexity of the bankruptcy cases, the size and skills of the local bar and the existing case law and local rules on confidentiality and conflicts. Establishing ADR programs by local rule not only allows the programs to be molded to the existing concerns of the individual districts, it also allows for revisions of the programs as the districts' needs change.[194]

Nevertheless, while maintaining the flexibility of ADR is crucial, the following issues should be considered by the drafters of any local rule on bankruptcy court-annexed mediation.[195]

A. *Scope of Mediation Program*

The first issue to be considered is the scope of mediation, including assignment to mediation, compliance with the Bankruptcy Code and effect on pending proceedings. How will matters be submitted to mediation? What types of cases are appropriate for mediation? What effect should the mediation rule have on other bankruptcy legislation or pending proceedings?

At a minimum, the local rule should provide for submission of a matter to mediation upon the stipulation of the parties.[196] Consensual mediation

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[194] For instance, certain jurisdictions may wish to begin with pro bono mediators but switch to a fee system as the program becomes more popular. Other jurisdictions may find that as their case load grows, their need for a more formalized ADR program increases. Further, many jurisdictions may wish to revise their rules as the local district courts revise theirs.

[195] These issues are, of course, drawn from the common characteristics of all bankruptcy mediation programs. *See supra* discussion accompanying notes 161-183. Within each broad issue, however, are a number of factors which should be considered by the drafters in the context of the individual needs of their district.

The bankruptcy court's authority to promulgate local rules is a derivative power that stems from 28 U.S.C. § 2075 (1994). FED. R. BANKR. P. 9029 delegates to the federal district courts the authority to make and amend local rules governing practice and procedure in bankruptcy proceedings. The district courts have uniformly delegated the local bankruptcy rule giving power to bankruptcy judges. A local rule governing bankruptcy cases will be upheld if: (1) it does not abridge, enlarge or modify any substantive right established by the Constitution or the Bankruptcy Code; and (2) it is a matter of procedure not inconsistent with the Bankruptcy Rules. *See* Ind. Fin. Corp. v. Falk, 96 B.R. 901, 904 (Bankr. D. Minn. 1989).

[196] Bankruptcy Rule 9019(c) already provides for submission of disputes to binding arbitration on stipulation of the parties. *See, e.g.*, General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67.

should avoid all constitutional challenges.[197] Drafters of a local rule may also wish to allow the court to assign a matter to mediation *sua sponte* or upon motion by any party in interest or the United States Trustee.[198] Ordering a party to participate in mediation may raise some constitutional concerns, but these concerns should be minimal as mediation proceedings are not binding.[199]

Further, drafters of the local rule may provide that any adversary proceeding, contested matter or other dispute be referred by the court to mediation.[200] Alternatively, the drafters may wish to except certain disputes such as employment and compensation of professionals, compensation of trustees and examiners, objections to discharge under 11 U.S.C. § 727 and matters involving sanctions.[201]

Finally, the local rule should provide that it does not relieve any debtor, party in interest or the United States Trustee from complying with the United States Code, the bankruptcy rules or the local rules.[202] The local rule should also provide that assignment to mediation shall not alter any time limits, deadlines or orders in any proceeding, unless specifically ordered by the court.[203]

B. *The Mediators*

The second issue to be considered involves the appointment, qualifications and compensation of mediators. How are mediators to be chosen? What qualifications are necessary for eligibility as a mediator? How and when will mediators be disqualified? How are mediators to be compensated, if at all?

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[197] *See* Lomax, *supra* note 4, at 89; *see also supra* discussion accompanying notes 45-59.

[198] Many local bankruptcy mediation rules include this provision. *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. Other local rules provide for submission of the matter to mediation by the judge *sua sponte* or upon request of the parties. *See, e.g.*, General Order No. 94-1001-14, *supra* note 170; General Order No. 12, *supra* note 177.

[199] *See supra* discussion accompanying 45-59.

[200] Many local bankruptcy mediation rules also include this provision. *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[201] *See, e.g.*, General Order No. 12, *supra* note 177.

[202] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[203] *See* General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. It is important not to allow a stay of proceedings to discourage parties from seeking mediation as a delaying tactic. *See supra* discussion accompanying notes 162-165.

At a minimum, the local rule should provide for a register of active qualified mediators to be maintained by the court.[204] Drafters of the local rule must consider whether all applicants will be accepted as mediators or whether the judges of the court will select the mediators.[205]

Drafters of the local rule should also consider whether the mediator will be appointed by blind draw, by stipulation of the parties or by the judge. In many jurisdictions, the parties are given the initial opportunity to select a mediator and, if they cannot agree, the mediator is appointed by the court.[206]

In addition, the local rule should provide that any person seeking to qualify as a mediator shall: (1) be licensed under applicable state laws applying to his or her profession for a minimum of five years; (2) be an active member in good standing of any applicable professional organization; (3) not have been suspended, disbarred or had their professional license revoked, nor have pending any proceeding to suspend or revoke such license nor have been convicted of any felony; and (4) have completed an approved mediation training course.[207] The drafters of the local rule must consider whether they wish to limit enrollment in the mediation register to attorneys or include real estate brokers, appraisers, engineers and other

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[204] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 12, *supra* note 177; General Order No. 117, *supra* note 163. Generally, the clerk of the court maintains the register. However, General Order No. 145 for the Southern District of California provides that the judge shall maintain the register. *See* General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67.

[205] Qualifications of mediators are discussed *supra* notes 166-175 and accompanying text. Oregon allows anyone to be a mediator who meets the stated qualifications. *See* General Order No. 93-1, *supra* note 163. However, other jurisdictions allow the judges to select a limited number of mediators from those who meet the stated qualifications. *See, e.g.*, General Order No. 12, *supra* note 177; General Order No. 94-1001-14, *supra* note 170; General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67. Appointments are limited "to keep the panel at the appropriate size and to ensure that the panel is comprised of individuals who have broadbased experience, superior skills and qualifications from a variety of legal specialties and other professions." General Order No. 12, *reprinted in* A.B.A. Bankruptcy Materials, *supra* note 163, at 5. The power of judges to appoint mediators is typically unreviewable. *See* Mabey et al., *supra* note 125, at 1279.

[206] *See, e.g.*, General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67; General Order No. 93-1, *supra* note 163. Drafters may also wish to set time limits within which the parties must agree on a mediator. Oregon sets the time at 7 days. *See* General Order No. 93-1, *supra* note 163.

[207] *See, e.g.*, General Order No. 93-1, *supra* note 163. Some jurisdictions also require the mediator to commit to service for a set term, such as one year. *See, e.g.*, General Order No. 12, *supra* note 177.

professionals.[208] The drafters may also wish to require attorney mediators to have served as the principal attorney of record in a minimum number of bankruptcy proceedings, adversary proceedings and contested matters. [209]

Further, the local rule should provide for disqualification of the mediator for bias or prejudice as provided in 28 U.S.C. § 144 or, if not disinterested, under 11 U.S.C. § 101.[210] The drafters should also consider whether the mediator should be disqualified from any matter where 28 U.S.C. § 455 would apply if the mediator were a judge.[211]

Finally, drafters of the local rule must consider the issue of compensation. Compensation of mediators will be one of the most difficult issues faced by the drafters.[212] The local rule may provide for compensation of the mediator pro bono, for a set fee or on an hourly basis.[213] The rule

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[208] Examples of local rules allowing professionals other than attorneys to serve include: General Order No. 93-1, *supra* note 163; General Order No. 12, *supra* note 177; General Order No. 94-1001-14, *supra* note 170; and General Order No. 117, *supra* note 163. However, General Order No. 145 in the Southern District of California is limited to attorneys.

[209] *See, e.g.*, General Order No. 145, *reprinted in* HARTWELL & BERMANT, *supra* note 63, at 67; General Order No. 12, *supra* note 177. *See also supra* notes 166-175 and accompanying text.

[210] *See, e.g.*, General Order No. 93-1, *supra* note 63; General Order No. 117, *supra* note 63. *See also supra* notes 117-123 and accompanying text.

[211] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. 28 U.S.C. § 455(b)(1) provides that the judge must excuse himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" 28 U.S.C. § 455(b)(1) (1993). Incorporating this provision should lessen concerns over conflicts of interest. *See supra* notes 114-123 and and accompanying text.

[212] *See supra* notes 173-175 and accompanying text. As one commentator has noted:

> Ultimately the issue of volunteer versus paid mediators will be determined through the marketplace by the parties. As mediation gains exposure and acceptance, sophisticated parties will develop an appreciation for and recognition of skilled, successful mediators. To the extent that these mediators are able to produce joint gains for the disputing parties, the parties will be willing to pay a price for the mediator services. If these skilled, successful mediators are willing to provide services on a volunteer basis, then a market for mediator services will exist only to the extent that demand for mediator services exceeds the supply of mediators provided through the volunteer programs.

Lomax, *supra* note 4, at 73.

[213] *See* Mabey et al., *supra* note 125, at 1279. The Southern and Northern Districts of California both provide for pro bono mediation, as does the Eastern District of Michigan. *See, e.g.*, General Order No. 145, *reprinted in*, HARTWELL & BERMANT, *supra* note 63, at 67; General Order No. 12, *supra* note 177; General Order No. 96-05, United States Bankruptcy

must provide for court approval if the estate is to be charged with the compensation of the mediator.[214] Pro bono mediation lessens concerns regarding mediators' compensation and conflicts of interest.[215] However, it may limit the pool of mediators.[216]

C. *The Mediation*

The third issue involves the procedure and the standard for participation in mediation. Who shall fix the time and place for mediation? Who must attend the mediation and what are the requirements for participation? What recommendations, if any, are required of the mediator? What procedures apply post-mediation? How are matters withdrawn from mediation? When does mediation terminate?

At a minimum, the local order should provide for the mediator to: (1) fix a time and place for the mediation conference, (2) give the attorneys and pro se parties advance written notice of the mediation, (3) have the authority to establish the time for all mediation activities including a deadline for the parties to act upon a settlement offer or a mediated recommendation, and (4) have the authority to request written mediation summaries, when needed.[217] The local rule should also require the

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Court, Eastern District of Michigan (on file with author). Conversely, the Southern District of New York and the District of Oregon both provide for the mediator's compensation to be on "such terms as are satisfactory to the mediator and the parties." General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[214] FED. R. BANKR. P. 9019. See *supra* notes 173-175 and accompanying text.

[215] *See supra* notes 114-123 and accompanying text.

[216] *See supra* note 123 and accompanying text.

[217] *See, e.g.*, General Order No. 117, *supra* note 163. Some jurisdictions require mediation statements. The Northern District of California requires mediation statements that:

> a. Identify the person(s), in addition to counsel, who will attend the session as representative of the party with decision making authority;
>
> b. Describe briefly the substance of the dispute;
>
> c. Address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement;
>
> d. Identify the discovery that could contribute most to equipping the parties for meaningful discussions;
>
> e. Set forth the history of past settlement discussions, including disclosure of prior and any presently outstanding offers and demands;
>
> f. Make an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses and trial; and
>
> g. Indicate presently scheduled dates for further status conferences, pretrial conferences, trial or otherwise.

mediation conference to be set as soon after the entry of the mediation order and as far in advance of the hearing as practicable.[218]

In addition, the local rule should require a representative of each party to attend the mediation conference and: (1) have authority to negotiate all disputed amounts and issues, (2) be prepared to discuss settlement positions, and (3) participate in good faith or be subject to court sanctions.[219] Drafters

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General Order No. 12, *supra* note 177. *See also* General Order No. 94-1001-14, *supra* note 170.

[218] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. Some rules establish a time limit within which the mediation conference must occur. *See, e.g.*, General Order No. 12, *supra* note 177 (conference must be held within 30 days of appointment of mediator).

Some jurisdictions also provide a checklist of duties for the mediator. General Order 12 for the Northern District of California requires each mediator to:

> a. Permit each party (through counsel or otherwise) to make an oral presentation of its position;
>
> b. Help the parties identify areas of agreement and, where feasible, enter stipulations;
>
> c. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning of the Resolution Advocate that supports these assessments;
>
> d. Assist the parties, through separate consultation or otherwise, in settling the dispute;
>
> e. Estimate, where feasible, the likelihood of liability and the dollar range of damages;
>
> f. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to participate in meaningful settlement discussions or to posture the case for disposition by other means; and
>
> g. Determine whether some form of follow-up to the conference would contribute to the case development process or to settlement.

General Order No. 12, *supra* note 177.

[219] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. *See supra* notes 176-179 and accompanying text. For examples of court imposed sanctions see Gilling v. Eastern Airlines, Inc., 680 F. Supp. 169, 170–172 (D.N.J. 1988) (upholding sanctions against a party for merely going through the motions in court-annexed arbitration); New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 715–716 (E.D. Pa. 1983) (denying trial de novo request of a defendant who presented no excuse for failing to appear at an arbitration hearing). *But see* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989) (noting courts that refused to deny the trial de novo request of parties who fail to participate

of the local rule should also consider whether they wish to require represented parties to attend or to leave this issue to the discretion of the mediator.[220]

The local rule should also provide that the mediator does not have an obligation to make written recommendations, but may do so in her discretion.[221] The rule should further provide that, in the event written recommendations are made, no copies shall be filed with the court or given to the judge.[222] The purpose of not filing or disclosing the recommendations is to preserve confidentiality.[223]

Further, the local rule should require the mediator to file a final report promptly upon conclusion of the mediation conference and, in any event, prior to the date fixed for hearing or trial. The final report should indicate compliance with the rule by the parties and the mediation results.[224] The local rule should also require parties reaching agreement to timely submit to the court a stipulated order or joint motion for approval of controversy.[225] However, absent a stipulated order or motion, no party should be bound by any statement made or action taken at the mediation conference.[226]

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meaningfully in ADR because the constitutionality of court-annexed ADR rests on the ability of the parties to go to trial if they fail to agree).

[220] The Northern District of California and the Eastern District of Pennsylvania require the parties to personally attend unless excused by the mediator. General Order No. 12, *supra* note 177; General Order No. 94-1001-14, *supra* note 170. The Northern District of New York gives the mediator the discretion to require a party to appear. General Order No. 117, *supra* note 163.

[221] *See, e.g.*, General Order 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[222] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163; General Order No. 12, *supra* note 170.

[223] As one commentator has stated, for bankruptcy ADR to be successful, "[T]he parties must feel comfortable enough to confide in the mediator and to admit weaknesses in their positions, so as to evaluate the reasonableness of a settlement proposal." 6 NORTON BANKR. L. & P., § 146: 4, at 146-14 (2d ed. 1994). *See also supra* notes 180-183 and accompanying text.

[224] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163; General Order No. 12, *supra* note 177. The Northern District of New York requires the mediator to file the report within 10 days of the mediation. General Order No. 117, *supra* note 163.

[225] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. Any settlements must be approved in accordance with Federal Rule of Bankruptcy Procedure 9019.

[226] *See supra* notes 180-183 and accompanying text.

Finally, the local rule should provide that any matter referred to mediation is subject to withdrawal by the court.[227] The drafters should consider what, if any, cause should be required for withdrawal.[228] The rule should further provide that, upon withdrawal or receipt of the mediator's final report, the mediation is terminated and the mediator is relieved from further responsibility.[229]

D. *Confidentiality*

The fourth issue involves confidentiality. How do the parties insure the confidentiality of the mediation effort? How do the parties insure the confidentiality of the mediator?

At a minimum, the local rule should provide that Federal Rule of Evidence 408 applies to mediation proceedings and that, except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral or judicial proceeding any aspect of the mediation.[230]

Drafters of the local rule may also wish to provide that: (1) confidential information disclosed by the parties or by witnesses in mediation shall not be divulged by the parties, (2) other than the mediator's final report, all records, reports or other documents received or made by a mediator shall be confidential, and (3) the mediator shall not be compelled to divulge such records or to testify regarding the mediation in connection with any arbitral or judicial proceeding.[231]

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[227] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[228] Oregon and New York provide that a matter may be withdrawn from mediation upon a determination that for "any reason" the matter is not suitable for mediation. They also allow a party to move for withdrawal. *See* General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[229] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163.

[230] *See, e.g.*, General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. Certain aspects of the mediation effort to be protected include: (1) views expressed or suggestions made by the other party with respect to a possible settlement of the dispute, (2) admissions made by the other party in the course of the mediation proceedings, and (3) proposals made or views expressed by the mediator. *See* General Order No. 93-1, *supra* note 163. *See also supra* notes 60-66 and accompanying text.

[231] *See* General Order No. 93-1, *supra* note 163; General Order No. 117, *supra* note 163. *See also supra* notes 60-66 and accompanying text. Mabey et al. propose the following addition to Federal Rule of Bankruptcy Procedure 9019(a) to preserve confidentiality: "CONFIDENTIALITY. *Conduct or statements made in the course of alternative dispute resolution are confidential and are considered to be made in the course of* compromise

VII. CONCLUSION

In recent years, the cost of litigation has substantially increased, the number of cases filed has mushroomed and the results have become increasingly unpredictable. "ADR has become so appealing because the judicial system has failed so many people."[232]

A primary goal of the Bankruptcy Code is the expeditious resolution of the financial affairs of the estate. Unnecessary delay, expense, uncertainty and duplication of effort are abhorred because of the limited resources available to spend on judicial proceedings.

Parties, such as litigants in a bankruptcy proceeding, who must interact on a regular basis in the future benefit greatly from consensual conflict resolution. The most successful of these is bankruptcy court-annexed mediation. It is the least costly in terms of time and money and the most likely to foster ongoing business relationships. Although there is ample precedent, authority and good reason for the use of court-annexed mediation in bankruptcy, many bankruptcy courts have failed to implement ADR programs.

One of the underlying principles of the Judicial Improvements Act of 1991 is "building reform from the bottom up."[233] This principle supports the practice of creating court-annexed mediation programs on a district-by-district basis. It is hoped that the guidelines provided in this article will facilitate that goal.[234]

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negotiations, within the meaning of Federal Rule of Evidence 408." Mabey et al., *supra* note 125, at 1311 n.192 (proposed addition in italics).

Further, in order to preserve confidences and secrets within the meaning of Bankruptcy Rule 9018, Mabey et al. propose the following amendment: "On motion or on its own initiative, with or without notice, the court may make any order which justice requires . . . (4) *to protect the estate or any entity with respect to any conduct or statements made or any paper disclosed in confidence in connection with alternative dispute resolution.*" Mabey et al., *supra* note 125, at 1311 n.192 (proposed addition in italics).

[232] Schine & Himelstein, *supra* note 1, at 88 (quoting Frank E.A. Sander, Director of Harvard Law School's Dispute Resolution Program).

[233] S. REP. NO. 416, 101st Cong., 14 (1990), *supra* note 193.

[234] For it is well established that "[t]oo much money is wasted on a system that serves no one well, except our economic competitors who benefit by our squandering of resources on document production and depositions instead of research and development." Lomax, *supra* note 4, at 90 (quoting Senator Joseph Biden, Chairman of the Senate Judiciary Committee, S. REP. NO. 416, 101st Cong., 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6810).